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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-802

ARTHUR J. LUCK and GLENN A. HENRY,

Petitioners,

vs.

UNION OIL CO. OF CALIF.; MOBIL OIL CORP.; GULF OIL CORP.; TEXACO INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners' Reply to Brief in Opposition.

JAMES J. OPPEN,
10 Marine Center Building,
Santa Barbara Breakwater,
Santa Barbara, Calif. 93109,
Attorney for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Question Presented.

The importance and substantiality of the questions presented for review have not been denied. The only claim of the respondents appears to be that the Court should decide the question upon the basis of nuisance, rather than upon the basis of the negligence to which they stipulated in the trial Court. Review here is suggested by virtue of the tacit admission that sufficient grounds for the issuance of a Writ of Certiorari exist.

Reply Brief Is Addressed to Arguments Raised by the Respondents in Their Brief in Opposition.

In their opening brief, petitioners advised this Court that the respondent oil companies had agreed to pay, "all legally compensable damages arising from a legally cognizable injury." Respondents correctly advised this Court that the stipulation did indeed contain much more, and quoted further from the stipulation saying, ". . . provided, however, that payment assumed hereby will not exceed such amounts and such claims as defendants or their contractors would be responsible for in a case of negligence."

After advising the Court of this fact, respondents appear to have switched the thrust of their position from negligence to nuisance, and urge this Court to deny the Petition upon grounds that the damages sought by petitioners are not recoverable under California law. Respondents go so far as to italicize for emphasis this contention throughout their brief.

By raising this contention, and now urging that nuisance law applies, rather than negligence, respondents now compel petitioners to cite California law to this Court in support of the fact that *California law does indeed provide a remedy to these petitioners* for loss of use of a pleasure boat.

California Courts consistently award damages for loss of use of personal property, and this right has now become so firmly established that it is no longer open to question. Loss of use of a repairable chattel is compensable whether the chattel be an automobile, a truck, a boat, an airplane, or any other chattel, and it makes no difference whether the chattel in question is used for business or for pleasure.

Since the Petition concerns itself with the loss of use of a pleasure boat, it is proper to cite to this Court the leading case in California, which upholds an award of damages for the wrongful detention of such a boat. In *Story v. Gateway Chevrolet Co.* (1965), 237 Cal.App. 2d 705, plaintiff's boat was wrongfully withheld from him by the defendant for a total of 143 weekends. The Court found that the boat was used principally on weekends and only for pleasure and awarded damages based upon the reasonable rental value of that boat.

Other cases which uphold the right to recover for loss of use are *Malinson v. Black* (1948), 83 Cal.App.2d 375 (an automobile). *Hurd v. Barnhart* (1878), 53 Cal. 97 (wagons). *Valencia v. Shell Oil Co.* (1944), 23 Cal.2d 840 (a truck). *Johnson v. Central Aviation Corp.* (1951), 103 Cal.App.2d 102 (an airplane). *Meyers v. Bradford* (1921), 54 Cal.App. 157 (an automobile).

Only in *Story* and *Malinson* did the Court consider that the chattel was used principally for pleasure, and that each plaintiff did not derive a pecuniary benefit from the use of the chattel. In each of those cases, the Court found that it made no difference whether the chattel was used for business or for pleasure. In the other cases cited, the Court at no time attempted to distinguish that the loss of use of the chattel involved commercial benefit as distinguished from loss of use for pleasure. Accordingly, the italicized emphasis of the respondents should be disregarded.

Respondents in contending that *The Conqueror*, 166 U.S. 110 (1897) should not be overruled simply state to this Court that the long-established rule denying recovery for detention of a vessel must be founded on

proof of actual loss of profits, and totally disregard that portion of the Petition wherein petitioners have set forth solid reasons why the time has come for this Court to overrule the doctrine of *The Conqueror*, and the drastic and dramatic changes that have taken place in the American way of life since that doctrine was enunciated. They merely cite to the Court many of the decisions following the rule of *The Conqueror*. It is interesting to note that none of the cases cited appear to reflect that anyone petitioned for a Writ of Certiorari.

Conclusion.

In the light of the tacit admission by the respondents that the Writ should be granted, and the failure of the respondents to deny the importance and substantiality of the questions presented, the Writ of Certiorari should be granted.

Respectfully submitted,

JAMES J. OPPEN,
Attorney for Petitioners.